IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 21ST NOVEMBER 2006 / 30TH KARTHIKA 1928

CRL.A.No. 1809 of 2005()

SC.802/2004 of ADDL. SESSIONS COURT (ADHOC), FAST TRACK COURT PATHANAMTHITTA
CP.133/2004 of JUDL.MAGISTRATE OF FIRST CLASS COURT, ADOOR

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APPELLANT:

JANARDHANAN, S/O. VELAYUDHAN,
C.NO.8461, CENTRAL PRISON, TRIVANDRUM-12.

BY ADV. ADV.P.V.VIJAYAKUMAR(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**V. RAMKUMAR, J.**

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**Crl.A.NO. 1809 of 2005**

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**Dated, this the 21st day of November 2006**

**JUDGMENT**

The appellant who was the sole accused in S.C. 802/04 on the file of the Additional Sessions Court (Adhoc) Fast Track Court-I, Pathanamthitta for offences punishable under Secs. 8(1) and 8(2) of the Abkari Act, challenges the conviction entered and the sentence passed against him by the said court.

2. The case of the prosecution can be summarised as follows:-

On 26-5-1995 at 5.45 p.m. when P.W.1, the Excise Preventive Officer attached to the Excise Circle Office, Adoor and his party were proceeding on patrol duty, they found the accused walking through the Thottamukku-Ganesa Vilasam Panchayath road from south to north by the side of the Panchayath well at Thengamam Kizhakke Muri carrying a white jerry can of 2 ½ liter capacity in his right hand with one liter of illicit arrack inside it. The accused has thereby committed the aforementioned offence.

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offence, the

prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 5 witnesses as P.Ws 1 to 5 and got marked 8 documents as Exts.P1 to 8 and one material object as MO1.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstance appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He stated that he was falsely implicated by the Excise officials.

5. Since the learned Judge did not consider this a fit case to record an order of acquittal under Sec. 232 Cr.P.C. the accused was called upon to enter on his defence. He did not adduce any defence evidence. The learned Addl. Sessions Judge, after trial, as per judgment dated 19-5-2005 found the appellant guilty of the offence and sentenced him to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 1,00,000/- and on default to pay the fine, to suffer simple imprisonment for two years. It is the said judgment which is assailed in this appeal preferred from the Central Prison, Thiruvananthapuram.

6. I heard Advocate Sri.P.V. Vijayakumar, the learned

counsel who defended the accused on State Brief and Advocate Sri. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

**THE POINT**

8. P.W.1 who was the Excise Preventive Officer detected the offence. P.W.2 who was also a Preventive Officer was in the company of P.W.1. P.W.3 is the independent witness who figures as one of the attestors to Ext.P1 mahazar. P.W.4 who was the Assistant Excise Inspector registered the crime and conducted the first part of the investigation. P.W.5 who was an Excise Inspector completed the investigation and laid the final charge before court.

The prosecution evidence is to the following effect:-

On 26-5-2003 at about 5.45 p.m. the Excise party headed by P.W.1 was proceeding on patrol duty from north to south from a place called Thenganam Kizhakke Muri towards the place called Thottamukku Ganesa Vilasam. The excise party was proceeding along the panchayath road. When they reached near the panchayath well on the eastern side of the road they came across the accused coming from the opposite direction with M.O.1 white jerry can having a

capacity of about 2 ½ liters. Seeing the excise party, the accused was perplexed and he attempted to decamp from the spot. Getting suspicious the excise party restrained the accused and asked him about the contents of the can in his hand. Since the accused did not divulge the contents in the can P.W.1 seized the can and examined its contents. He was convinced that the contents in the can was illicit arrack. This was ascertained through taste and smell. The accused was arrested and the can was seized under Ext.P1 mahazar. Two independent witnesses including P.W.3 affixed their signatures to the mahazar. After drawing a sample of 200 lml. from M.O.1 can the can as well as the sample were seized after labelling and sealing the same. Ext.P1 is the contemporaneous mahazar prepared by P.W.1. Ext.P2 is the arrest memo to which also the independent witnesses affixed their signatures. Ext.P3 is the notice of arrest despatched to Kamalamma, the wife of the accused. The accused as well as the contraband liquor and the contemporaneous seizure documents were all produced before by P.W.4. the Excise Inspector who registered Ext.P5 crime and occurrence report. The accused and the properties were produced before the committal court on the next day. The sample was subsequently dispatched through the committal court to the Chemical Examiner's Laboratory from where Ext.P8 certificate was

obtained to the effect that the sample contained 32.75 percent by volume of Ethyl Alcohol.

10. The learned counsel appearing for the appellant made the following submissions in support of his fervent plea for acquittal of the appellant:-

M.O.1 which was in court does not contain the label which P.W.1 had allegedly pasted at the time of detection. Going by the charge as well as the evidence of P.W.1 the Excise party was proceeding from north to south. P.W.2 , though he maintained the said stand in his chief examination, stated in cross-examination that they were proceeding from south to north. This is diametrically opposite to the case of the prosecution. Similarly, the final report at one place shows that the case was detected on prior information whereas in the body of the report it is stated that it was detected suo motu during patrol duty. When the only independent witness and attestor to Ext.P1 has turned hostile to the prosecution and the prosecution has not chosen to examine the other attestor, the case of the prosecution cannot be believed since the remaining witnesses are all official witnesses who cannot be expected to deviate from the prosecution case.

11. I am afraid that I cannot agree with the above

submissions. The excise party headed by P.W.1 and which consisted of P.W.2 were proceeding from north to south on patrol duty when they chanced to detect the accused carrying M.O.1 can in his hand. The statement of P.W.2 in cross-examination that it was from south to north that they were proceeding can only be regarding the direction of the accused who was coming from the opposite direction. This is because both P.Ws 1 and 2 have stuck to the version contained in Ext.P1 contemporaneous mahazar that the excise party was proceeding from north to south. Hence, I do not consider the statement of P.W.2 in cross-examination to be a vital contradiction so as to disbelieve the prosecution case.

12. No doubt, MO1 which is before court does not carry the label which was allegedly affixed by P.W.1. But the can was seen broken and the contents of the can had leaked not fully. From the place of detection itself P.W.1 had taken a sample from the bulk quantity carried by the accused and the sample as well as the remaining quantity of contraband liquor together with the contemporaneous records had been dispatched post-haste to the court after affixing seal on the same and they reached the Court also on the next day. I do not find any good ground to disbelieve the statement of P.Ws 1 and 2 in this behalf. The sample which was

drawn by P.W.1 from the bulk quantity was dispatched to the chemical examiner through the committal court which subsequently received Ext.P8 report confirming that the sample was illicitly distilled arrack containing 32.75 percent by volume of Ethyl Alcohol.

13. No doubt, P.W.3 the only independent attester to Ext.P1 mahazar turned unfriendly to the prosecution. Courts are not unfamiliar with such witnesses who turn out to be cunning performers in the witness box during trial. **(See Sivaraman v. State of Kerala - 1981 KLT (SN) 9).** Even P.W.3 admitted his signature in Ext.P1 mahazar and Ext.P2 arrest memo. Thereafter he was pretending ignorance of what transpired in the scene. Much strain is not necessary to conclude that he was turning disloyal to the prosecution with the only intention of salvaging the accused. In the face of the credible testimony of P.Ws 1 and 2, the hostility shown by P.W.3 cannot render the prosecution case unworthy of credence. The trial court which had the advantage of seeing the witnesses and assessing their credibility was inclined to accept the testimony of P.Ws 1 and 2. I see no reason to disagree with the appreciation of evidence by the trial judge.

14. The result of the foregoing discussion is that the conviction recorded by the learned Sessions Judge does not call for any

interference. The sentence imposed on the appellant is also commensurate with the gravity of the occurrence. Offenders of this nature cannot be allowed to be let off with a flee-bite sentence. I see no ground to interfere with the sentence as well.

In the result, this Criminal Appeal is dismissed confirming the conviction and the sentence passed against the appellant.

**V. RAMKUMAR,**
**(JUDGE)**

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**V. RAMKUMAR, J.**

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**Crl.A.NO. 1809 of 2005**

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**Dated, this the 21st day of November 2006**

**JUDGMENT**